IN THE

Supreme Court of the United States

October Term, 1960

No. 84

In the Matter of

ALBERT MARTIN COHEN,

Petitioner,

v.

DENIS M. HURLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The majority, concurring and dissenting opinions of the Supreme Court of the State of New York, Appellate Division, Second Department (R. 62-79) are reported in 9 App. Div. 2d 436, 195 N. Y. S. 2d 990. The majority and dissenting opinions of the Court of Appeals of the State of New York (R. 81-92) are reported in 7 N. Y. 2d 488, 166 N. E. 2d 672. The Court of Appeals' amended remittitur to the Appellate Division (R. 95, 96) is not reported.

Jurisdiction

The judgment of the Court of Appeals of New York was entered on April 1, 1960. The petition for a writ of certiorari was filed May 7, 1960, and was granted June 6, 1960. The jurisdiction of this Court rests on 28 U. S. C. Sec. 1257 (3).

Questions Presented

1. May a State, consistent with the due process of law guaranteed by the Fourteenth Amendment, disbar an attorney, absent any evidence of misconduct, unfitness or bad character and solely because he refused, in good faith and on the advice of counsel, to answer questions before a general judicial inquiry in reliance on his privilege against self-incrimingtion?

2. May a State, claiming to have undisclosed information of professional misconduct by an attorney, consistent with due process, summon that attorney to a preliminary inquiry, threaten him with that information without disclosing its nature, and on his refusal to testify in reliance on his privilege against self-incrimination, disbar him for that refusal without affording him a full hearing based on the claimed adverse information?

Constitutional Provision Involved

United States Constitution, Amendment XIV, Section 1, Clause 2:

> " . . . nor shall any State deprive any person of . . . liberty, or property without due process of law . . ."

Statement

On January 21, 1957, the Appellate Division, Second Department, ordered a general judicial inquiry (hereinafter called the "Inquiry") into solicitation and related practices in the County of Kings, New York (R. 18-20). From March 1957 to June 1958 the Inquiry's staff examined informally about 2,500 persons. See *Anonymous* v. *Baker*, 360 U. S. 287, 292. Subsequently, petitioner, in response to subpoenas served upon him, appeared before the inquiry on October 28, 1958, Mr. Justice Arkwright, then presiding, and on May 19, 1959, Mr. Justice Baker, then presiding (R. 22-61).

During the course of his interrogation, petitioner was assured by the Inquiry that he had not been called as a prospective defendant or respondent (R. 32); that the Inquiry was not an adversary proceeding (R. 32); and that he was not being charged with having committed any of the illegal practices with which the Inquiry was concerned (R. 32). However, he was informed by the Inquiry's interrogator that, " . . . we have information that indicates your participation in professional misconduct . . . " (R. 32). The nature of many of the questions asked plainly suggested that statements adverse to petitioner had been made by one or more of the numerous unidentified informants previously interrogated by the Inquiry's staff. Nevertheless, no evidence of petitioner's alleged professional misconduct was ever produced, no further disclosure of the allegedly adverse information was ever provided, and no source was ever identified. Thus, petitioner had no opportunity to confront or cross-examine his alleged accusers or otherwise avail himself of the protection of the due pro-

cess clause. Petitioner in this situation, in good faith, heeded his counsel's advice and invoked his constitutional privilege against self-incrimination.* He had answered a number of questions and indicated a willingness to answer more, but yielded to his counsel's admonition to refrain from doing so lest he waive his constitutional privilege (R. 43).

It was conceded, as it had to be, that petitioner's assertion of the privilege was neither contumacious nor contemptuous, but was in good faith and within his constitutional rights (R. 54, 64).

On July 9, 1959, respondent, the Inquiry's attorney, petitioned the Appellate Division to discipline petitioner solely for his refusal to waive his privilege against self-incrimination by testifying (R. 5-16). No charges were made on the basis of the allegedly adverse evidence which respondent claimed to possess. If such charges had been made, New York would have required the observance of all of the procedural safeguards encompassed by due process, viz, adequate notice of the specific charges, confrontation and adequate opportunity for cross examination of the theretofore unidentified informants, opportunity to offer evidence in explanation, rebuttal or mitigation, and, finally, respondent would have had to sustain the burden of proving the charges.

In his brief before the Appellate Division, respondent indicated that it was cheaper and quicker to proceed as

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* In the course of the Inquiry, petitioner for the same reason refused to produce certain records demanded by a subpoena duces tecum. The issues raised by this refusal have been treated throughout these proceedings as identical to those raised by the refusal to testify.

he did than to incur the "expenditure of time, energy and money" (Respondent's Brief before the Appellate Division, p. 20) that would be necessary to make a case of professional misconduct against petitioner. No hearing was held on the charges of professional misconduct intimated by respondent, and not a scintilla of evidence was introduced to reflect adversely on petitioner's unblemished career at the bar for over thirty-seven years. His distinguished record as a member of the New York State Assembly (1928-1934), his endorsement for the post of Justice of the Domestic Relations Court in New York by the Association of the Bar of the City of New York, the New York County Lawyers Association and the Brooklyn Bar Association and his record of successful practice and good standing at the bar continuously for almost four decades, stands here unassailed and unassailable.* The sole issue before the Appellate Division was whether the uncontested fact that petitioner had refused to waive his constitutional privilege by testifying warranted disciplinary action.

Petitioner, on July 31, 1959, in his Answer to Respondent's Petition, explicitly asserted that disciplinary action would violate his rights under the due process clause of the Fourteenth Amendment to the United States Constitution (R. 61, 62).

The Appellate Division, Second Department, one justice dissenting, rejected petitioner's contention and held that his privileged refusal to answer in and of itself constituted

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* Petitioner actually served as a Justice of the Domestic Relations Court for one month in January 1958 as a temporary replacement during the ill-health of one of the regular members of that Court.

professional misconduct warranting permanent disbarment (R. 62-79). The order of disbarment was entered on December 31, 1959 (R. 3, 4).

On April 1, 1960, the Court of Appeals, Judge Fuld dissenting, affirmed the disbarment order below (R. 81-95). On April 21, 1960, the Court of Appeals amended its remittitur to the Appellate Division, Second Department, to state (R. 95-100):

> "Upon the appeal herein there was presented and necessarily passed upon questions under the Constitution of the United States, viz.: 'The appellant asserted that his disbarment based solely upon his reliance in good faith on his constitutional privilege against self-incrimination in a non-adversary proceeding without any substantive charges of misconduct being made or proven against him at a full hearing where the right of confrontation and cross-examination of witnesses and full and ample defense would be available was violative of due process of law under the Fourteenth Amendment, and that his disbarment based on his assertion in good faith of his constitutional privilege against self-incrimination which the Appellate Division held constituted a refusal to cooperate with the Court and a breach of the Canons of Ethics violated his guarantees of due process of law under the Fourteenth Amendment.' The Court of Appeals held that the rights of appellant under the Fourteenth Amendment had not been violated."

Summary of Argument

I. The right to practice law cannot be taken away arbitrarily. E.g., *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232. The State of New York has arbitrarily denied petitioner the right to practice law. It has disbarred him without adducing a scintilla of evidence to impeach his character or fitness to practice law.

The only conduct of petitioner claimed to warrant his disbarment is his refusal in reliance on his privilege against self-incrimination to answer questions put to him by a judicial inquiry into solicitation and related practices. It is obvious and indeed conceded that petitioner was within his constitutional rights in so refusing. 7 N. Y. 2d 488, 495, 166 N. E. 2d 672, 675. See, e.g., *Slochower* v. *Board of Higher Education*, 350 U. S. 551; *Ullmann* v. *United States*, 350 U. S. 422, 426; *Quinn* v. *United States*, 349 U. S. 155, 161.

This is particularly true when, as here, the privilege is invoked in an inquisitorial proceeding, where the witness is unable to summon his own witnesses or cross-examine those against him and where he is evidently under consideration as a potential defendant. In such circumstances, the logical tendency of the assertion of the privilege to prove guilt is "less than negligible". *Grunewald* v. *United States*, 353 U. S. 391, 424; *Griswold, The Fifth Amendment Today*, pp. 21-22. Consequently, it would be arbitrary and capricious and so a denial of due process to infer guilt from petitioner's assertion of his privilege in this case.

Respondent and the Courts below avow that they are making no direct inference from petitioner's assertion of

the privilege. They state that his refusal to testify, considered entirely separate and apart from the privilege, damns him. But the very same context that makes an inference of professional unfitness from petitioner's assertion of his privilege irrational similarly impeaches any attempt to infer unfitness from his refusal to testify. His refusal, concededly privileged, was one that any prudent, innocent man in good faith was fully justified in asserting without incurring the professional death penalty or subjecting him to any disciplinary proceeding.

In *Konigsberg* v. *State Bar of California, supra,* this Court squarely held that California could not rationally find Konigsberg lacking in good character merely because he refused to answer certain questions put to him. The probative force of Konigsberg's refusal was held to be so outweighed by Konigsberg's showing of good character that it would be a denial of due process to find him lacking in good character. So here New York could not rationally find petitioner unfit merely because he refused to answer certain questions put to him. Petitioner, unlike Konigsberg, was not obliged to establish his fitness. Under the law of New York, respondent had the burden of proving petitioner's unfitness. Nevertheless, it is a matter of public record that petitioner served with distinction in the New York State Assembly for seven years, was recently endorsed for a local judgeship by three Bar Associations and has never before, in almost forty years at the Bar, had his character questioned. It is plain, then, that here, even more so than in *Konigsberg,* the record cannot support an inference of bad moral character or unfitness.

But respondent and the Courts below seem to go further. They suggest that petitioner's character and fitness are

beside the point: whether he is fit or not, if he refuses to testify in an investigation into attorney practices, he may be disbarred. In other words, refusal to testify, however worthy the refuser may be, *ipso facto* disqualifies him for the practice of law. This view, too, is so arbitrary as to constitute a denial of due process.

A State can decide that conduct constitutes a per se disqualification for the practice of law only if there is some rational basis for so deciding. But once it is demonstrated that the conduct in question will not support an inference of unfitness to practice, it would seem to follow that there is no rational basis for making it a per se disqualification. Consequently, once it is decided, as it must be here, that petitioner's refusal to testify in good faith and in reliance on his privilege against self-incrimination cannot support an inference of poor moral character or unfitness, it follows that his refusal cannot be made a per se disqualification.

It need only be added that a holding that New York has acted arbitrarily in disbarring petitioner without evidence of his unfitness to practice would do no noticeable harm to any valid interest of the State. Petitioner's refusal to testify has not left the State impotent to obtain the information it claims to want from him. The Inquiry's activities have been paralleled by a grand jury investigation into solicitation, conspiracy to solicit, and related misconduct by attorneys. This grand jury is empowered to grant immunity sufficiently broad to take the place of the privilege against self-incrimination. *In Re Cioffi*, 192 N. Y. S. 2nd 754 (Kings Co. Ct.), affirmed App. Div. (2d Dept.), N. Y. L. J., June 28, 1960, p. 1, cols. 1-6, aff'd by Ct. of Appeals, N. Y. L. J., July 12, 1960, p. 6, col. 3. Consequently, the State need only summon petitioner before

this grand jury to learn from him all that it desires to know. Nor has petitioner's refusal to testify left the State powerless to discipline him if, as it claims, it has information of professional misconduct on his part.

II. The right to practice a profession may not be taken away except by a proceeding that comports with all the essentials of procedural due process. E.g., *Ex parte Robinson*, 19 Wall. 505, 512; *Ex parte Garland*, 4 Wall. 333, 378; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123. The essentials include a judicial type hearing at which the party whose rights are being determined is fully apprised of the charges against him and the evidence to support those charges; is permitted to confront and cross-examine witnesses; and is afforded an opportunity to offer evidence in explanation, rebuttal or mitigation.

Instead of affording petitioner these rights with respect to the information of professional misconduct respondent claimed to have, respondent employed a procedural shortcut that effectively deprived petitioner of all of these safeguards. Respondent interposed a preliminary inquiry, threatened petitioner with undisclosed information from unknown sources, and, when petitioner naturally took refuge in his privilege against self-incrimination, utilized that as a basis for disbarment proceedings. The practical effect of this procedure is to disbar petitioner for refusing to meet an undisclosed case without the weapons of confrontation and cross-examination. See *Sheiner* v. *Florida*, 82 So. 2d 657, 661 (S. Ct. of Fla.). Petitioner's natural caution in the invocation of his basic constitutional rights is made to take the place of an affirmative demonstration of professional misconduct. This is a denial of due process.

III. The right of a private citizen, including lawyers and other licensees, to pursue his calling is afforded greater protection by the due process clause than the right of a public employee to continue on the public payroll. E.g., *Ex parte Garland*, 4 Wall. 333, 378; *Parker* v. *Lester*, 227 F. 2d 708, 717 (9th Cir.). Consequently, the instant case is not controlled by this Court's decisions in cases involving public employees, viz, *Lerner* v. *Casey*, 357 U. S. 468; *Beilan* v. *Board of Education*, 357 U. S. 399; and *Nelson and Globe* v. *County of Los Angeles*, 362 U. S. 1.

ARGUMENT

I.

New York acted arbitrarily and denied due process to petitioner when it disbarred him without any evidence of misconduct, unfitness or bad character, but solely because he refused admittedly in good faith, as was his right, to answer questions before a general judicial inquiry, in reliance on his privilege against self-incrimination.

A. The right to practice law cannot be denied arbitrarily.

This Court has held many times that the right to practice law cannot be denied arbitrarily. *Konigsberg* v. *State Bar of California, supra*; *Schware* v. *Board of Examiners, supra*; *Ex parte Robinson, supra*; *Ex parte Garland, supra.* Mr. Justice Black, writing for the Court in *Schware*, summed the matter up this way (353 U. S. at 238-239):

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner

> or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. [citations omitted] A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

The State of New York has arbitrarily denied petitioner the right to continue to practice law, his only means of livelihood for over thirty seven years. It has disbarred him without adducing a scintilla of evidence to impeach his character or competence to practice law.

Neither distortion nor legal semantics can obscure the inescapable fact that petitioner's disbarment was based exclusively on his assertion of his constitutional right not to be compelled to testify against himself—an assertion indisputably availed of in the utmost good faith, on the advice of competent counsel and by an attorney whose long standing at the bar has been otherwise unimpeachable. If such drastic consequences automatically follow the invocation of the constitutional right under such circumstances, then that constitutional right becomes nothing more than a snare and a delusion. No argument, no matter how often repeated, nor by what sources, can logically refute the contention that disbarment in such a situation is arbitrary beyond any doubt whatever.

B. Assertion of the privilege against self-incrimination in good faith in any case will not support any inference of any lack of good moral character or of any misconduct or unfitness whatever.

The only conduct of petitioner that can possibly be claimed to warrant his disbarment is his refusal to answer questions put to him by the Inquiry in reliance in good faith and on the advice of counsel, on his privilege against self-incrimination. Can any moral deficiency be inferred from that conduct? This Court has stated again and again that an assertion of the privilege against self-incrimination cannot support an implication of guilt. Mr. Justice Harlan, writing for the Court in *Grunewald* v. *United States, supra,* provided a compendium of some of the recent authorities (353 U. S. at 421):

> "We need not tarry long to reiterate our view that, as the two courts below held, no implication of guilt can be drawn from Halperin's invocation of his Fifth Amendment privilege before the grand jury. Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men. Griswold, the Fifth Amendment Today, 9-30, 53-82. 'Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege.' Ullmann v. United States, 350 U. S. 422, 426. See also Slochower v. Board of Higher Education, 350 U. S. 551, when, at the same Term, this Court said at pp. 557-558: 'The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.' "

Any experienced advocate, and certainly the members of this Court, would not fail to appreciate the possibility of such an ensnarement of a reputable attorney in the circumstances disclosed by this record. See, e.g., *Quinn* v. *United States, supra; In Re: The Integration Rule of The Florida Bar,* 103 So. 2d 873 (S. Ct. of Fla.); Telford Taylor, *Grand Inquests* (1955), p. 197.

The basic function of the privilege: "to protect innocent men" seems particularly applicable in the context of the instant case. Petitioner did not assert his privilege in a proceeding avowedly brought against him, with advance notice of the charges, an opportunity to cross-examine adverse witnesses, and all the other procedural safeguards afforded by due process. On the contrary, the subpoena served upon him by the Inquiry did not put him on notice that he would be called upon to defend himself against charges of professional misconduct. When petitioner appeared, he was explicitly assured that he had not been summoned in the role of a prospective defendant. The line of questioning, however, to which petitioner was subjected belied this disclaimer and petitioner was belatedly informed by the Inquiry's attorney that the Inquiry had information indicating misconduct on his part. Petitioner was thus confronted with unspecified charges of professional misconduct with no opportunity to defend himself in accordance with American concepts of justice. In this context petitioner's able and experienced attorney wisely advised him to invoke his constitutional privilege and refuse to answer, and petitioner followed his advice.

The situation is emphasized by comparison with the *Grunewald* case where this Court concluded that the weight to be given Halperin's assertion of his privilege against

self-incrimination "was less than negligible" (353 U. S. at 424). The Court was led to this conclusion by circumstances quite like those present here: Halperin was a compelled witness before the grand jury, unable to summon his own witnesses or cross-examine those against him; he was not represented by counsel in the grand jury room;* "and most important, . . . when Halperin was questioned before the grand jury, he was quite evidently already considered a potential defendant" (Id. at 423). And so this Court decided that (Ibid.):

> "It was thus quite consistent with innocence for him to refuse to provide evidence which could be used by the Government in building its incriminating chain. For many innocent men who know that they are about to be indicted will refuse to help create a case against themselves under circumstances where lack of counsel's assistance and lack of opportunity for cross-examination will prevent them from bringing out the exculpatory circumstances in the context of which superficially incriminating acts occurred."

Dean Griswold, too, spotlights the fallacy of inferring misconduct from the assertion of the privilege before an inquiry like the one conducted below. Thus in *The Fifth Amendment Today* (1955), he states (at pp. 21-22):

> "Ordinarily when the privilege of the Fifth Amendment is exercised, it is in a criminal trial. There a specific charge has been made, and the prosecution has by evidence established a prima facie case of guilt of the particular crime charged in the complaint or indictment. Under such circum-

* Petitioner's counsel was permitted to accompany him, but, of course, he had little chance to be useful, since he had no opportunity to question anyone, not even the petitioner.

stances there is much more than the mere claim of the privilege on which to rest an inference of guilt.

"In investigations, however, there ar no carefully formulated charges. Evidence to support such charges has not been introduced and made known to the witness before he is called upon to answer. He has no opportunity for cross-examination of other witnesses, and often little or no opportunity to make explanations which might have a material bearing on the whole situation. In the setting of an investigation, therefore, the basis for the inference from a claim of privilege against self-incrimination is much less than it is when the privilege is exercised in an ordinary criminal trial."

C. Petitioner's invocation of the privilege, under the circumstances of this case, will not support any inference of any lack of good moral character or of any misconduct or unfitness.

Respondent contended and the Courts below held that it is not petitioner's reliance on his privilege that disqualifies him, but his refusal to testify, irrespective of the reason. In other words, the Courts below held that however worthy to practice petitioner may be, the sole fact that he refused to testify before the Inquiry proved him to be unworthy. That conclusion is wholly arbitrary, as *Schware* and *Konigsberg* demonstrate.

In *Schware*, this Court unanimously held that the New Mexico Supreme Court had denied Schware due process of law by unreasonably finding that he had failed to show good moral character. It was this Court's view that in the light of Schware's "forceful showing of good moral character" (353 U. S. at 246), the New Mexico Court could not rationally infer bad character from Schware's earlier his-

tory of arrests, use of aliases and seven years in the Communist Party; that the New Mexico Court had erred by unduly emphasizing these events to the neglect of the real question before it—was Schware of good moral character? And that the record in *Schware* permitted only one answer to that question.

Similarly, in *Konigsberg*, this Court held that the California authorities could not, in the light of the evidence of Konigsberg's good character, infer poor moral character or doubtful loyalty from Konigsberg's refusal to answer certain questions about his political associations and beliefs.

The New York Court has inadvertently failed to heed the lesson of *Schware* and *Konigsberg*. It has given disproportionate weight to petitioner's refusal to testify and has ignored his otherwise unchallenged good character and fitness to practice. Standing out in bold relief is the fact that petitioner, unlike Schware and Konigsberg, did not have the burden of producing evidence on the issue of his character and fitness. See, e.g., *Matter of Fisch*, 231 App. Div. 192; 246 N. Y. S. 760 (1st Dept.); *Matter of Cook*, 242 App. Div. 224, 273 N. Y. S. 13 (1st Dept.); *Matter of Farrell*, 237 App. Div. 678, 262 N. Y. S. 766 (1st Dept.).*

* These authorities would seem to make it unnecessary for this Court to decide here whether due process requires the State to carry the burden of proof in a proceeding to disbar. However, if the Court should deem the question material, its decisions on related questions indicate that the State would be denying due process if it imposed upon an attorney the burden of proving that he had not engaged in misconduct sufficiently serious to warrant his disbarment. See, e.g. *Speiser* v. *Randall*, 357 U. S. 513; *Tot* v. *United States*, 319 U. S. 463.

Petitioner is not an applicant for admission to the Bar. Unlike an applicant, he has already persuaded the appropriate authorities of his competence and character; and, if he is in fact unfit, surely respondent should have been able to find some evidence of that unfitness somewhere in petitioner's thirty-seven years at the Bar. Not only has respondent failed to come forward with such evidence, but it is a matter of public record that petitioner served with distinction in the New York State Assembly for seven years, that just three years ago he was endorsed for the post of Justice of the Domestic Relations Court in New York by three outstanding New York City Bar Associations, and that his character has never before been questioned.

The conclusion of the Court of Appeals for the District of Columbia Circuit in *In Re Carter*, 177 F. 2d 75, 78, cert. denied, 338 U. S. 900, seems apt:

> "An applicant for admission to the bar must satisfy the authorities as to his moral character, and custom has established confidential inquiry as an element of that procedure. But when he has been admitted, his removal from practice is a disbarment, about which elaborate procedural requirements are thrown. Such removal after admission is not a mere denial of an application for admission. The same is true in respect of licenses to do business in many forms. Prior to grant, many processes are available for inquiry and information. But once granted, the license becomes a right, and due process of law must be followed to achieve deprivation."

Petitioner's refusal to testify, considered without reference to any claim of privilege, does not even tend to impugn

his character and fitness. It is conceded that his refusal was not contemptuous or contumacious. Given the inquisitorial nature of the proceedings and respondent's threats, both implied and expressed, petitioner was "quite evidently already considered a potential defendant" to use again the language of the *Grunewald* case (*supra*); his refusal was no more than a simple act of self-protection, and a concededly privileged one at that.*

The *reductio ad absurdum* that Mr. Stanley A. Weigel suggests in his *The Fifth Amendment and the Lawyer's Responsibility*, is strikingly apposite, 34 Neb. L. Rev. 586, 589 (1955):

> "The lawyer before us is a member of the bar in good standing. He has been so for many years. His professional activity has been without blemish. His citizenship has been flawless. He is an innocent man, a reputable lawyer and a good citizen.
>
> "Nothing intervening, he now exercises a right guaranteed him by the Constitution of the United States (which he has sworn to uphold).
>
> "Presto! This self-same man has now forfeited his right to practice his profession, losing all standing as a lawyer. His innocence is now questionable. His good citizenship is now suspect."

Finally, could there be any remaining doubt that petitioner's refusal to testify casts no adverse reflection on his character or fitness, it should be noted that petitioner was advised by counsel and believed that since he had a right to refuse to testify in reliance on his privilege against self-

* See, 7 N. Y. 2d 488, 495, 166 N. E. 2d 672, at 675, where the Court below concedes petitioner's right to invoke the privilege.

incrimination, he could not possibly be breaching any duty by so doing. Indeed, petitioner was abundantly warranted in believing that the highest Court in his State had repeatedly held that an attorney does no wrong by refusing to testify in reliance on his privilege against self-incrimination. See the Court's opinion below (7 N. Y. 2d at 494, 166 N. E. 2d at 675). *Matter of Grae*, 282 N. Y. 428, 26 N. E. 2d 963; *Matter of Ellis*, 282 N. Y. 435, 26 N. E. 2d 967; and see also, *Matter of Kaffenburgh*, 188 N. Y. 49, 80 N. E. 570; *Matter of Solovei*, 276 N. Y. 647, 12 N. E. 2d 802, aff'g without opinion 250 App. Div. 117, 293 N. Y. S. 640 (2nd Dept.). Petitioner's view of the New York authorities is shared and approved by the highest Courts of Florida and Illinois, by eminent scholars, and indeed, it would appear, by this Court. See *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 270 and note 31; *Sheiner* v. *Florida*, 82 So. 2d 657, 661-662; *In re Holland*, 377 Ill. 346, 36 N. E. 2d 543, 547; Walter Gellhorn, *Individual Freedom and Governmental Restraints* (1957), p. 139; Telford Taylor, *Grand Inquest* (1955), p. 211; and see Judge Fuld's dissenting opinion below. Even the New York Court of Appeals recognized that there seemed to be but a slight difference between its holdings in the prior cases and the present case, for in its opinion below it said this of its earlier decisions (7 N. Y. 2d at 497, 166 N. E. 2d at 677):

> "The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. The difference between those cases and the present one may seem slight but it is enough to permit a fresh examination (or re-examination) of the question now directly presented."

On the record in this case, Mr. Justice Frankfurter's conclusion in his concurring opinion in *Schware* seems applicable. He said (353 U. S. at 251):

> "To hold, as the court did, that Communist affiliation for six to seven years up to 1940, fifteen years prior to the court's assessment of it, in and of itself made the petitioner 'a person of questionable character' is so dogmatic an inference as to be wholly unwarranted."

So it is here: to hold that petitioner's reliance on his privilege against self-incrimination in and of itself impeached his moral character and proved him unfit to practice law "is so dogmatic an inference as to be wholly unwarranted".

D. No State can constitutionally make a refusal to testify a *per se* disqualification to practice law.

In *Konigsberg* v. *State Bar of California*, 52 Cal. 2d 769, 344 P. 2d 777 (1959), in which case this Court very recently granted certiorari, 362 U. S. 910, the Supreme Court of California had held that even though Konigsberg's moral character could not be questioned on the record presented, his refusal to testify *ipso facto* disqualified him from admission to the Bar. Respondent presumably will adopt that view and maintain that petitioner's refusal to testify, *ipso facto*, regardless of all else, disqualifies him from continuing to practice his lifelong profession.

This view has been held by this court in its opinion in the first *Konigsberg* case, 353 U. S. 252, to be so arbitrary as to constitute a denial of due process when applied to applicants for admission to the Bar. Unquestionably is it so when applied to one who has already been admitted.

Once it is demonstrated that the conduct in question will not support an inference of unfitness to practice, it would seem to follow that there is no rational basis for a State making it a *per se* disqualification. Consider, for example, this Court's decision that Schware's prior arrests, use of aliases and membership in the Communist Party could not support an inference of the lack of the requisite good character. Similarly, once it is decided, as it must be here, that petitioner's refusal to testify in reliance on his privilege against self-incrimination cannot support an inference of lack of good character or of unfitness, it follows that there is no rational basis for making it a *per se* disqualification.

The arbitrariness of a rule that would make a refusal to testify before an inquiry into attorney practices an *ipso facto* disqualification to practice law becomes still more apparent if one considers some other situations to which such a rule would presumably apply. Suppose, for example, that the Inquiry summoned before it an attorney who was counsel to several of the lawyers being investigated by the Inquiry. If this attorney were asked to reveal all that his clients had told him and he refused, reminding the Inquiry of his duty to preserve the confidences of his clients, the theory advanced by respondent and the Courts below would seem to require his disbarment. Or suppose that an Arkansas Court were to undertake an inquiry into champerty and maintenance, with particular reference to whether the N.A.A.C.P. was guilty of those offenses, and an attorney were asked to provide the names of many of the Association's members so that they might be summoned as witnesses. If he refused, the theory advanced by respondent and the Courts below would seem to require his disbarment. And yet *Bates* v. *City of Little Rock*, 361 U. S. 516, 80 S. Ct.

412, almost certainly requires the conclusion that disbarment under those circumstances would be a denial of due process. To cite just one more example, suppose that a Federal Court were investigating professional misconduct by several individual attorneys on the staff of the Justice Department and a United States attorney were subpoenaed to produce certain relevant Department papers in his custody. This Court has held that he may refuse to comply with that subpoena if a Department regulation so requires. *United States ex rel. Touhy* v. *Ragan*, 340 U. S. 462. And yet the theory advanced by respondent and the Courts below would seem to require his disbarment.

In these hypothetical situations, and they could be extended indefinitely, the recalcitrant attorney seems to have failed in what the Court below has called the duty to "be candid and frank with the court at all times (Canon 22)". (7 N. Y. 2d at 496, 166 N. E. 2d at 676.) In none of them, it is submitted, could disbarment withstand an attack on due process grounds. And the reason is simple: the context of each refusal must be examined, and when it is examined, it appears that none of the refusals reflects adversely on the refuser's fitness to practice law. And so it is with the context in which petitioner refused to testify.

Surely, if an attorney's refusal to testify cannot subject him to disciplinary action when he bases that refusal on the statutory attorney-client privilege or on Justice Department regulations, the valid assertion of a constitutional privilege as a basis for refusal cannot produce a different result. To hold otherwise could only mean that the privilege against self-incrimination has in fact become the admission of guilt that the uninformed take it to be. But this Court, time and time again, has vigorously opposed that concep-

tion of the privilege. Mr. Justice Frankfurter stated in *Ullmann* v. *United States,* that the privilege against self-incrimination (350 U. S. at 426-427):

> ". . . registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' [Griswold, The Fifth Amendment Today (1955), p. 7] Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bills of Rights as a condition to acceptance of the Constitution by the ratifying States . . ."

See similar statements in, e.g., *Slochower* v. *Board of Education,* 350 U. S. at 557; *Grunewald* v. *United States,* 353 U. S. at 421; *Quinn* v. *United States,* 349 U. S. at 161. Relying in part on these authorities, the Supreme Court of Florida recently rejected efforts to amend the rules dealing with the practice of law in Florida to permit disbarment for invoking the privilege against self-incrimination. It held that since the innocent may invoke this privilege, "its exercise may not be considered a breach of duty to the court". *In Re: The Integration Rule of Florida Bar,* 103 S. 2d at 875.

It need only be added that a holding that New York has acted arbitrarily in disbarring petitioner without evidence of his unfitness to practice would do no noticeable harm to

any valid interest of the State. Petitioner's refusal to testify has not left the State impotent to obtain the information it claims to want from him. (The phrase "claims to want" is used advisedly, for respondent has implied that he already has this information from other sources.) The Inquiry's activities have been paralleled by a grand jury investigation into solicitation, conspiracy to solicit, and related misconduct by attorneys. The New York Courts have recently held that this same grand jury is empowered to grant immunity sufficiently broad to take the place of a witness' privilege against self-incrimination. *In re Cioffi, supra.* Consequently, the State need only summon petitioner before this grand jury to learn from him all that it desires to know.

Nor has petitioner's refusal to testify left the State powerless to discipline him if, as it claims, it has information of professional misconduct on his part.

Judge Fuld highlighted these points well in his dissent below, and they are incontrovertible. He said:

> "It is hardly necessary to say that a scrupulous regard for the constitutional limitation will not leave the disciplinary authority powerless or a guilty attorney immune. If, as counsel for the judicial inquiry stated toward the conclusion of the investigation, there was information indicating the appellant's 'participation in professional misconduct,' his unwillingness to furnish information might have justified institution of a disciplinary proceeding founded on such information. And, if such proceeding were to be brought and the appellant were to stand mute therein, he would have to bear all of the legitimate inferences stemming from the damaging evidence adduced against him. It is also relevant

that, where immunity is conferred—by overriding the claim of privilege and compelling the witness to answer the questions—and the testimony shows that he is not fit to continue as a lawyer, he may then be disbarred or otherwise disciplined. (See Matter of Rouss, 221 N. Y. 81, 86 et seq., supra.)"

II.

By summoning petitioner to a preliminary inquiry, threatening him with undisclosed information of professional misconduct and when he refused to testify in reliance on his privilege against self-incrimination, disbarring him solely for that refusal instead of affording him a full hearing based on the claimed adverse information, the State denied petitioner due process of law.

It has long been established that the right to practice a profession or to pursue a particular line of private employment is entitled to constitutional protection and may not be taken away except by a proceeding that comports with all the essentials of procedural due process. E.g., *Ex parte Robinson*, 19 Wall. 505, 512; *Ex parte Garland*, 4 Wall. 333, 378; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123; *Sheiner* v. *Florida*, 82 So. 2d 657, 661 (S. Ct. Fla.); *In Re: Burke*, 351 P. 2d 169, 172 (S. Ct. of Ariz.); *Parker* v. *Lester*, 227 F. 2d 708, 717 (9th Cir); *Matter of Los Angeles County Pioneer Society*, 217 F. 2d 190 (9th Cir.); *In Re: Carter*, 177 F. 2d 75, 78 (D. C. Cir.) cert. denied 338 U. S. 900; *In Re: Carter*, 192 F. 2d 15, 17 (D. C. Cir.) cert. denied 342 U. S. 862; *Laughlin* v. *Wheat*, 95 F. 2d 101 (D. C. Cir.); *United States* v. *Hicks*, 37 F. 2d 289 (9th Cir.); cf. *Konigs-*

berg v. *State Bar of California, supra; Schware* v. *Board of Bar Examiners, supra.*

In *Ex parte Robinson, supra,* this Court said (19 Wall. at 512):

> "Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court, and, as said in *Ex parte Garland,* 'they hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.' Before judgment disbarring a lawyer is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property . . . The principle that there must be citation before hearing, and hearing or opportunity to be heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."

More recently in *Goldsmith* v. *Board of Tax Appeals, supra,* this Court similarly stated (270 U. S. at 123):

> "The rules adopted by the Board provide that 'the Board may in its discretion deny admission, suspend or disbar any person.' But this must be

> construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process."

The foregoing cases make it clear that the mandate of due process requires a judicial type hearing at which the party whose rights are being determined is fully apprised of the charges against him and the evidence to support those charges; is permitted to confront and cross-examine witnesses; and is afforded an opportunity to offer evidence in explanation, rebuttal or mitigation. Consequently, if, in the absence of the judicial inquiry, respondent had sought to have petitioner disbarred, the respondent would have been obliged to make specific charges of professional misconduct, to present evidence in support of those charges, to permit petitioner to cross-examine witnesses and present evidence of his own, and, finally, respondent would have had to sustain the burden of proving the charges.*

Instead respondent employed a procedural short-cut that effectively deprived petitioner of all of these safeguards. Respondent interposed a preliminary inquiry that was plainly intended to present petitioner with a Hobson's choice. Without providing petitioner with any specific charges, indeed without warning him at all that he would be called upon to defend himself and after informing peti-

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* Presumably this much will be conceded by respondent, for the New York authorities accord with the cited decisions from other Courts in securing the rights listed to an attorney in a disbarment proceeding. *N. Y. Judiciary Law*, Sec. 90(6); *Matter of Eldridge*, 82 N. Y. 161, 166-167; *Matter of Kaufmann*, 245 N. Y. 423, 157 N. E. 730, 734; *Matter of Joseph*, 125 App. Div. 544, 109 N. Y. S. 1018 (1st Dept.); *Matter of Lynch*, 227 App. Div. 477, 238 N. Y. S. 482 (1st Dept.); *Matter of Fisch*, 231 App. Div. 192, 246 N. Y. S. 760 (1st Dept.).

tioner that he had not been summoned in the role of a prospective defendant, respondent proceeded to question petitioner in a way that clearly belied this disclaimer. All too late, respondent went so far as to inform petitioner that the Inquiry had information indicating professional misconduct on his part. No such information was presented and petitioner was left in the dark as to the source of the information, its nature, and whether any steps had been taken to test its credibility. Petitioner was thus given the option of meeting an undisclosed case against him or of following the dictates of prudence and asserting his privilege against self-incrimination. When he naturally followed the advice of his attorney to take the latter course, respondent and the lower courts seized upon this as a substitute for an affirmative demonstration that petitioner had been guilty of professional misconduct and instituted disbarment proceedings.

It is submitted that this proceeding constitutes an attempt to subvert and destroy petitioner's constitutional right to an adversary-type hearing and is a clear denial of due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States. To be sure, petitioner could have had a hearing here, but, because of respondent's tactics, it would have been a worthless one. It would have dealt solely with the uncontested question of whether petitioner refused to testify in reliance on his privilege against self-incrimination. It would not have begun with presentation of the specific charges of misconduct alluded to by respondent at the Judicial Inquiry. It would not have continued with the presentation of evidence to support those charges. It would not have given petitioner the opportunity to rebut those charges with all the weapons that procedural due process affords.

The practical effect of the procedure followed was to disbar petitioner on the basis of undisclosed information provided by unseen informers, a procedure most recently held a denial of due process in *In Re: Burke*, 351 P. 2nd 169 (S. Ct. of Ariz.). In *Sheiner* v. *Florida*, *supra*, the Supreme Court of Florida recognized that there is no difference between the procedure employed below and condemnation without trial. Reversing a judgment of disbarment based solely upon an attorney's refusal to answer questions on the ground that the answers might tend to incriminate him, the Court said (82 So. 2d at 661):

> "The last cited case [*Matter of Murchison*, 349 U. S. 133] and the Peters Case [*Peters* v. *Hobby*, 349 U. S. 331] are pertinent here for the emphasis they place on confrontation, cross-examination and fair trial as ingredients of due process. Confrontation and cross-examination under oath are essential to due process because it is the means recognized by which we test the probity of the evidence and eliminate that which is trumped up or of doubtful veracity. The 'faceless informer' theory of proof should never be substituted for confrontation and cross-examination in a trial where the end result is to deprive the accused of one of his most precious assets—the privilege to practice law."

Mr. Justice Kleinfeld stated in his dissenting opinion below 9 A. D. 2d at 449, 195 N. Y. S. 2d at 1004:

> "If the respondent is guilty of any violation of the laws, rules or regulations appertaining to the conduct of attorneys, and this is proved in an adversary proceeding against him after he has had the right to confront his accusers, cross-examine witnesses on his own behalf, and the benefit of all the other safeguards of due process, then he may be disciplined as

the court deems proper. Absent such proceeding, the respondent has been denied his rights under the Constitutions of this State and of the United States."

If the judgment below is permitted to stand, it will serve as a model for those who would evade constitutional safeguards which this Court has been at great pains to preserve. The new procedure will be simple: summon the person whose license to practice law is sought to be revoked; make vague threats about possessing adverse information so that the target will be moved to assert his privilege against self-incrimination; then revoke the license because the licensee has failed to cooperate with the investigation. In this way the inconvenience of presenting a case against the intended victim can safely be avoided. That this is not an overdrawn picture of what occurred below is best indicated by respondent's statement in his brief (p. 20) before the Appellate Division that it was cheaper and quicker to proceed in this manner than to incur the "expenditure of time, energy and money" that would be necessary to make a case of professional misconduct against petitioner.

It should not be assumed that only attorneys are vulnerable to the kind of constitutional avoidance attempted by respondent. Hosts of Americans, like attorneys, need licenses from the State in order to earn their livings. These people too, are entitled to procedural due process before the State may deprive them of their livelihoods. E.g., *Parker* v. *Lester*, 227 F. 2d 708 (9th Cir.) (merchant seaman); *In Re: Carter*, 177 F. 2d 75 (D. C. Cir.) cert. denied 338 U. S. 900 (bail bondsman); *Hecht* v. *Monaghan*, 307 N. Y. 461, 121 N. E. 2d 421 (taxi driver); *Alpert* v. *Board of Governors of City Hospital*, 286 App. Div. 542, 145

N.Y. S. 2d 534 (4th Dept.) (physician); *Miami* v. *South Miami Coach Lines, Inc.*, 59 So. 2d 52 (S. Ct. of Fla.) (bus line); *Parker* v. *Board of Barber Examiners*, 84 So. 2d 80 (La. Ct. App.) (barber college).

If the decision below is upheld, there would seem to be nothing to prevent the States from making all licensees second-class citizens whose cardinal right to earn a livelihood can be terminated in accordance with procedures that evade due process requirements. The number of people that would be included in that category is enormous. Some idea of the potential impact of the principle contended for by respondent can be gathered from Professor Gellhorn's summary of the vast range of governmental licensing activity in his *Individual Freedom and Governmental Restraints*, at p. 106:

> "By 1952 more than 80 separate occupations, exclusive of 'owner-businesses' like restaurants and taxicab companies, had been licensed by state law; and in addition to the state laws there are municipal ordinances in abundance, not to mention the federal statutes that require the licensing of such diverse occupations as radio operators and stockyard commission agents. As long ago as 1938 a single state, North Carolina, had extended its laws to 60 occupations. One may not be surprised to learn that pharmacists, accountants, and dentists have been reached by state laws, as have sanitarians and psychologists, assayers and architects, veterinarians and librarians. But with what joy of discovery does one learn about the licensing of threshing machine operators and dealers in scrap tobacco? What of egg graders and guide-dog trainers, pest controllers and yacht salesmen, tree surgeons and well diggers, tile layers and potato growers? And what of the pypertrichologists

> who are licensed in Connecticut, where they remove excessive and unsightly hairs with the solemnity appropriate to their high-sounding title?"

It would be highly ironical if the first group of licensees to be deprived of procedural due process were the lawyers. Not only are they the sworn defenders of due process, but they are the group society most needs protected from arbitrary reprisals. History is replete with the names of intrepid attorneys who have championed causes which at the time were unpopular in order to perpetuate the cause of freedom and democracy. As this Court stated in *Konigsberg v. State Bar of California*, 353 U.S. at p. 273:

> ". . . A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers are unintimidated—free to think, speak and act as members of an Independent Bar."

And we do not hesitate to add, free to exercise their constitutional rights. Nor does an attorney make enemies only by taking an unpopular political position. As the New York Court of Appeals observed in *Matter of Eldridge*, 82 N. Y. 161, 166-167, 37 Am. Rep. 558:

> "His professional life is full of adversaries. Always in front of him there is an antagonist, sometimes angry and occasionally bitter and venomous. His duties are delicate and responsible, and easily subject to misconstruction. . . ."

It is a delusion to think that the public welfare is advanced by the sacrifice of an attorney's basic liberties. The exigencies of the moment cannot justify resort to pro-

cedures which are foreign to our Anglo-American traditions of fair play or which deny basic constitutional rights. As Mr. Justice Cardozo (then Chief Judge of the Court of Appeals of New York) said in *Matter of Doyle*, 257 N. Y. 244, 268, 177 N. E. 489, 498:

> "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.' (Holmes, J. in Northern Securities Co. v. United States, 193 U. S. 197, 400)."

III.

The questions presented have not been resolved by this Court's decisions in cases involving public employees, as the right of a private citizen to pursue his calling must be afforded greater protection than the right of a public employee to continue on the public payroll, if the due process clause is not to be judicially exterminated.

The Court below relied in part upon this Court's decisions in *Lerner* v. *Casey*, 357 U. S. 468; *Beilan* v. *Board of Education*, 357 U. S. 399; and *Nelson and Globe* v. *County of Los Angeles*, 362 U. S. 1, decided February 29, 1960. The import of these cases, all decided by a sharply divided Court, is, that a State may constitutionally discharge a public employee, paid by public funds, for refusing to answer questions relevant to his employment even though the refusal is based upon his privilege against self-incrimination.

The reliance by the Courts below upon such cases involving public employees ignores the settled distinction between the rights of private citizens and those of public employees.

The authorities have always proceeded on the principle that the Government as an employer must possess many of the powers with respect to its employees that a private employer has. Indeed, at one time it was widely believed that the due process clause afforded the governmental employee no protection whatever insofar as his job was concerned. See, *Bailey* v. *Richardson*, 182 F. 2d 46, 57 (D. C. Cir.), aff'd by equally divided Court, 341 U. S. 918. Although this approach to the rights of governmental employees has been modified considerably in recent years (See, e.g., *Wiemann* v. *Updegraff*, 344 U. S. 183), it is still true that the Government, in its role as employer, can demand many things from its employees that it cannot demand from private citizens merely because they hold a license from the State. No libertarian outcry is prompted by denial of the right to strike to Government employees. But could a State constitutionally deny the right to strike to, say, barbers and taxi drivers without providing some compensatory substitute for that right? It is also true that a State may constitutionally discharge an employee for taking an active part in political activities. *United Public Workers* v. *Mitchell*, 350 U. S. 75. Does this mean that it can constitutionally disbar attorneys for engaging in political activities? Indeed, there would seem to be nothing in the Constitution requiring a State to maintain a civil service system in preference to a spoils system. And yet a State would surely be denying due process if it disbarred all attorneys who happened to support the wrong political party.

Many cases have explicitly recognized the difference between public employees and private citizens. For example, in *Ex parte Garland*, 4 Wall. at 378, this Court said:

> "The profession of an attorney and counselor is not like an office created by an Act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution."

In *Parker* v. *Lester*, *supra*, the Court of Appeals for the Ninth Circuit, in holding unconstitutional a security program which summarily prevented merchant seamen from carrying on their vocation, stated (227 F. 2d, at p. 717):

> "The liberty to follow their chosen employment is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job. It has been suggested that the latter is not entitled to protection of the due process clause. Bailey v. Richardson, 86 U. S. App. D. C. 248, 182 F. 2d 46, 57 . . . The plaintiffs here are citizens of the United States and the rights and liberties which they assert relate not to any public employment present or prospective, but to their right to pursue their chosen vocations as merchant seamen."

Indeed, this Court in *Cammer* v. *United States*, 350 U. S. 399, 406-407, quoted with approval the statement that an attorney has as good a right to the exercise of his profession,

> ". . . as the mechanic has to follow his trade, or the merchant to engage in the pursuits of commerce . . . The public have almost as deep an interest in the independence of the bar as of the bench."

Nor does an attorney's role as an officer of the Court make him the equivalent of a public servant. In the *Cammer* case (350 U. S. at 405) this Court pointed out that, unlike other Court officers such as marshals, bailiffs or clerks,

> " . . . a lawyer is engaged in a private profession, important though it be to our system of justice. In general, he makes his own decisions, follows his own best judgments, collects his own fees and runs his own business."

The Supreme Court of Florida recently indicated its awareness of the irrelevance of cases involving public employees. After its decision in *Sheiner* v. *Florida*, 82 So. 2d 657, holding that the disbarment of an attorney for refusing to answer in reliance on his privilege deprived him of due process of law, that Court, on July 24, 1958, ordered further argument limited to the impact of *Beilan* and *Lerner*, supra. The Court subsequently reaffirmed its earlier position, thereby frustrating another attempt to disbar Sheiner for his invocation of the privilege. *Florida* v. *Sheiner*, 112 So. 2d 571.

The Supreme Court of Illinois is in accord. *In Re*: *Holland*, 377 Ill. 346, 36 N. E. 2d 543. In the course of holding on State grounds that the suspension of an attorney for assertion of the privilege constituted error, that Court distinguished the case from that of a policeman asserting the same privilege.

Even the New York Courts, before their turn-about in the instant case, recognized that a State does not possess the same power over private citizens that it does over public employees. In *Hecht* v. *Monaghan*, 307 N. Y. at 468-469, 121 N.E. 2d at 424, the Court of Appeals said:

> "In the present case, however, the petitioner is not the employee of any public body nor is he the appointee of any municipal officer. Rather, he is a private citizen whose livelihood is derived from the fares and gratuities he receives from the persons whom he serves as a licensed hack driver. He is not under the direct supervision of a public official in the performance of his daily routine, but is merely regulated with regard to certain aspects of his business. The rules applicable to the disciplining, suspension and discharge of civil employees should not be extended to include the suspension or revocation of licenses of those whose salaries are not paid from public funds."

And the Court of Appeals that had decided that an attorney could not be disbarred for refusing to yield his privilege against self-incrimination, in the *Matter of Ellis*, 282 N. Y. 435, 26 N. E. 2nd 967, did so in the face of a decision only six weeks earlier that a police officer could be dismissed for refusing to sign a waiver of immunity, *Cantelline* v. *McClellan*, 282 N. Y. 166, 25 N. E. 2d 972. Notwithstanding the fact that *Cantelline* v. *McClellan* was urged upon the Court of Appeals in Ellis,* it held that an attorney could not be disciplined for a similar refusal.

So also the Supreme Judicial Court of Massachusetts in *Opinion of the Justices*, 332 Mass. 763, 126 N. E. 2d 100, held that a statute would be unconstitutional if it required the discharge of teachers in private as well as public schools solely for invoking the privilege against self-incrimination at an inquiry. Thus the Court in distinguishing between public and private employment of teachers, cogently stated (126 N. E. 2d at 103):

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* See brief of Petitioner-Respondent in *Matter of Ellis*, at pp. 24-25.

> "Nothing in this opinion is inconsistent with what was recently decided in the case of Faxon v. School Committee of Boston, 331 Mass. 531, 120 N. E. 2d 772. In that case the question was whether a public board having charge of public schools could in the exercise of its judgment in a particular instance dismiss a public school teacher for refusing to testify about his relations with communism. In that case the public as represented by the school committee had the rights of an employer in the selection and retention of employees suitable to the enterprise in hand. There was no attempt to interfere generally with the petitioner's practice of his profession. The question there was whether the school committee could be compelled to employ the petitioner in public employment. The question now before us is whether *all* employers public *or private* can be compelled *not* to employ a person who has exercised his constitutional right. The difference is obvious." (emphasis is the Court's)

It is in the context of the Government as employer that the decisions in *Beilan, Lerner* and *Nelson and Globe* must be read. This Court was, of course, aware that it was dealing with public employees in those cases. Indeed, it is even fair to say that it emphasized that fact at a number of points. See, e.g., *Beilan* v. *Board of Education,* 357 U. S. at 405, 408-409, 410.

When read in context, it is plain that *Beilan, Lerner* and *Nelson and Globe* do not mean that the State is free to do to its licensees whatever it may do to its employees. Any other reading would seriously jeopardize many of our fundamental liberties, for millions of Americans are licensees hitherto thought to be safe from the kind of restrictions that Governments may impose upon their employees. An

extension of the doctrine of those cases to cover attorneys engaged in private practice or other licensees would not only be illogical, it would be devastating so far as constitutional rights are concerned.

* * *

It is useful to remember that the founding fathers regarded the privilege against self-incrimination as a fundamental protection of the individual and as a bulwark against the collectivism of the State, that New York too numbers the privilege among its constitutional safeguards,* and that the law of every State in the Union accepts it. Consequently, there is no blinking the fact that, whatever the theory, if it were finally determined that a State may disbar an attorney solely because he relied on this universally recognized privilege, it will be taking a large step down the road to the destruction of individual rights. And that path once taken is difficult to retrace. Professor Gellhorn made the point eloquently in responding to the suggestion that the lawyer's privilege should yield to his so-called "duty of candor":

> "Running counter to that view, however, is the lawyer's duty to defend rather than diminish the nation's constitutional heritage. That heritage would undoubtedly lose some of its richness if exclusion from the bar were to be predicated on invocation of a constitutional protection. No matter how frequently the courts and legal writers point out that a Fifth Amendment plea is not a confession of guilt, the lay public (and, indeed, some lawyers as well) presist in regarding the exercise of constitutional priyilege as a proof of unworthiness. The bar should be able to recognize other people's insensi-

* New York Constitution, Article I, Section 6.

tivities and misconceptions without sympathetically absorbing and, as it were, legitimatizing them. The Fifth Amendment, Dean Erwin Griswold has said, is 'a symbol of our best aspirations and our deep-seated sense of justice.' Cherished for generations as a safeguard against ancient abuses—abuses that have their contemporary expression in the police states Americans abhor—the Fifth Amendment is now challenged in the name of security. Lawyers cannot afford to join in an emotional hunt for perfect security at the expense of traditional liberties. The incautious discarding of one constitutional protection cheapens others as well, for the erosion of values is a process not easy to halt." Gellhorn, *Individual Freedom and Governmental Restraints*, at pp. 139-140.

CONCLUSION

In the last analysis, a lawyer continuously engaged in the practice of his profession for over thirty-seven years, whose character and fitness therefor has been certified on his admission to practice and has never since been questioned, finds himself disbarred by the lower courts for his refusal to waive a constitutional right which is one of the great prides and glories of our American system of the true administration of justice. Exercising the privilege in good faith, relying on the advice of competent counsel, supported by a number of decisions of the highest court of his own State, which that Court now effectually repudiates in these words:

"The holding in each case was that a lawyer like every other citizen is constitutionally privileged not to answer damaging questions. The difference be-

> tween those cases and the present one may seem slight but it is enough to permit a fresh examination (or re-examination) of the question now directly presented,"

this petitioner has received what to him is a professional death penalty. What the Court of Appeals calls a slight difference is in reality non-existent. The tragic injustice inflicted upon petitioner demands correction by this Court and the preservation of the constitutional privilege against self-incrimination, despite its destruction that some have advocated when applied to lawyers. The affirmance of the judgment below would deprive the petitioner of his only means of livelihood, regardless of his unquestioned good character and fitness and an exemplary record and standing as a lawyer. We submit that no such miscarriage of justice based on distorted concepts of the ethical, moral or professional duties and obligations of an attorney should be countenanced by this Court. The judgment below should be reversed and the bar of this nation thus assured that the exercise of their constitutional privileges in good faith will not be construed by this Court as any evidence whatever of professional misconduct or as the automatic, *ipso facto, per se* relinquishment of the cherished right to continue to practice an honorable profession.

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